IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 15, 2002 Session

STATE OF TENNESSEE v. GDONGALAY P. BERRY

Direct Appeal from the Criminal Court for Davidson County
No. 96-B-866 J. Randall Wyatt, Jr., Judge

No. M2001-02023-CCA-R3-DD - Filed April 10, 2003

The Appellant, Gdongalay P. Berry, was found guilty by a jury of two counts of first degree murder, two counts of especially aggravated robbery, and two counts of especially aggravated kidnapping. Berry's convictions stem from the execution-style murder of two individuals involved in the illicit sale of weapons. The jury returned a sentence of death for each of the homicides based upon its finding of three aggravating factors; *i.e.*, prior violent felonies, murder committed for the purpose of avoiding prosecution, and murder committed during commission of a robbery or kidnapping. Tenn. Code Ann. § 39-13-204(i)(2), (6), (7) (Supp. 2002). The Davidson County Criminal Court subsequently imposed concurrent twenty-five-year sentences for the especially aggravated robbery convictions and concurrent twenty-five-year sentences for the especially aggravated kidnapping convictions. The robbery and kidnapping sentences were ordered to run consecutive to one another and consecutive to the sentences of death, resulting in an effective sentence of death plus fifty years. Berry appeals, presenting the following issues for our review:

I. Whether Tennessee's death penalty procedures are constitutional;

II. Whether he was denied his right to a speedy trial;

III. Whether the trial court erred by denying his request for hybrid representation, and whether the trial court erred in allowing him to represent himself at the suppression hearing;

IV. Whether the trial court erred in failing to suppress his statement;

V. Whether, during the jury selection process, the trial court abused its discretion regarding rehabilitation issues;

VI. Whether the trial court erred in admitting evidence of gang affiliation;

VII. Whether the trial court erred by permitting testimony of a hearsay statement made by the co-defendant which inculpated Berry;

VIII. Whether the prosecutor made an inappropriate religious comment during closing argument;

IX. Whether the trial court properly instructed the jury as to flight;

X. Whether the evidence was sufficient to support his convictions; and

XI. Whether, during the penalty phase of the trial, the trial court erred by allowing a victim's mother to testify that her son pled for his life prior to being shot.

After review, we find no error of law requiring reversal. Accordingly, we affirm Berry's convictions and the imposition of the sentences of death in this case.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed.

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Thomas F. Bloom and James A. Simmons, Nashville, Tennessee, for the Appellant, Gdongalay P. Berry.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Dana M. Ausbrooks, Assistant Attorney General; Katrin Miller and David Hamm, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The proof, in the light most favorable to the State, established that, on the evening of February 27, 1996, the Appellant, then nineteen years old, was at co-defendant Christopher Davis' apartment, located at 2716-B Herman Street in Nashville. Antonio Cartwright, then fourteen years old, Ronald Benedict, and Andre Kirby were also present. On this date, the Appellant and Davis, both members of the Gangster Disciples, had arranged to buy weapons for $1,200.00 from the victims, Greg Ewing and DeAngelo Lee, then eighteen and nineteen years old, respectively. According to Cartwright, the Appellant and Davis, at some point in the evening, discussed a robbery of guns and an automobile from the victims. Cartwright also testified that the Appellant stated, "If we rob 'em, we gotta kill 'em. . . . Because they know us." After receiving a phone call from Lee,

the Appellant, Davis, Yakou Murphy, and Sneak[1] left the apartment. Davis was carrying a black bag, which contained handcuffs, rope, and duct tape. Murphy and Sneak returned to the apartment approximately thirty minutes later. About "a half an hour, maybe 45 minutes to a hour" after Murphy's and Sneak's arrival, the Appellant and Davis returned, driving a white Cadillac and in possession of "at least six assault rifles," pagers, and "some clothes," including green and yellow tennis shoes. The Appellant and Davis brought the rifles into the apartment and placed them under Davis' bed. Davis was wearing a gold cross necklace, which belonged to the victim Lee. Cartwright testified that the Appellant said, "Chris couldn't kill Greg, so I had to," and that the Appellant stated he shot Ewing multiple times in the head. The Appellant, referring to the Cadillac, then said, "We gotta burn it." The Appellant and Davis left the apartment, driving the Cadillac and another vehicle. They burned the Cadillac and proceeded to a Nashville motel, where they spent the evening.

The following morning, two bodies were found on a construction site in the Berry Hill area of Nashville. Detective Mike Roland of the Metropolitan Police Department described the scene as follows:

> At the scene, there were – well, to kind of describe the scene, you have the street. There's an elbow in the street right here (indicating). Interstate I-40 runs to the left of that. There's a little dirt gravel road that kind of goes off into the grass. To the right of that was a hillside. At the bottom, in the gravel/dirt/driver area was a pair of tennis shoes. There was a small, gold cross, or at least gold in color. Just to the bottom of the hill was a pair of khaki pants. There was a white rope that was kind of bunched up and then extended up the hillside towards the bottom of the first victim you came to, as you're coming up the hill. That victim was later identified as Greg Ewing. He was lying face up, partially clothed, gunshot wounds, just up to – it would have been his right, but to my left, looking up the hill was the second – the second victim, who was identified as DeAngelo Lee, also, partially clothed, but he was laying face down with his hand on his head. We located some shell casings there and projectile.

Detective Alfred Gray went to the scene to assist in identification of the bodies. Unable to identify the bodies, he, along with Detectives Pat Postiglione and Bill Pridemore, proceeded to Davis' apartment to investigate an unrelated crime. The three detectives arrived at the apartment around 9:00 a.m., and Ronald Benedict, Davis' roommate, answered the door. Antonio Cartwright was also present. While questioning the two individuals, the detectives observed some automatic rifles in Davis' bedroom. At this time, the Appellant, Davis, Dimitrice Martin, and Brad Benedict "came rushing through the door, very quickly." Davis was talking on a cell phone and had a handgun in his waistband, and the Appellant was carrying a loaded automatic rifle. The Appellant, Davis, and Brad Benedict then ran out of the apartment, and the detectives pursued them. While being pursued, the Appellant dropped the rifle he was carrying on the sidewalk. Davis was the only individual apprehended.

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[1] This individual is not identified by any other name in the record.

A search was thereafter conducted of the apartment. A High-Point brand 9-millimeter pistol was discovered underneath a cushion, where Ronald Benedict had been previously sitting on the couch. Officer Earl D. Hunter testified that the following items were also discovered:

> a Rossi gun box, a pair of Smith and Wesson handcuffs, with a key, a pager, a Motorola cell phone, a purple Crown Royal bag, a – also, what I called a lock puller or a – some people, I guess, in the body shop business call it a dent puller, a large knife, a set of car keys, a rifle cleaning rod, a green ammo belt, a black backpack type bag[.] . . . I collected twenty-three live, .30 caliber rounds, a – eight .45 caliber live rounds, which were brand name W.C.C. There was also a jacket, a leather cloth brown and blue jacket. There was two .45 clips, .30 caliber carbine clips, two .45 caliber pistols, two SKS rifles, one Universal .30 caliber M-1 carbine, a flashlight, two pair of gloves, brown pullover shirt, a pair of blue coveralls, also a hundred and twenty-six .762 by .39 live shell casings, one spent .762 by .39 shell casing. . . . Oh, I saw – I did collect $1400 in cash.

Davis, Cartwright, and Ms. Martin were taken to the police station to be interviewed. Martin testified that, before being questioned, Davis gave her the gold cross necklace, and told her to put it in her purse. Martin also testified that Davis told her to call Maquana Madaries, who was at the apartment, and tell her to dispose of the green and yellow tennis shoes. After questioning the three individuals, Detective Postiglione returned to the apartment to retrieve the tennis shoes and jacket, which had been determined to belong to the victim Ewing. The jacket was located on Davis' bed, but the tennis shoes, which had been seen by the detectives during the earlier search of the apartment, were not found. The police also took possession of the necklace from Martin at the police station.

Based upon statements from the individuals at the apartment, the Appellant was developed as a suspect in the murders. In the early morning hours of March 6, 1996, the Appellant was arrested at 886 Carter Avenue in Nashville and subsequently gave a statement to Detectives Roland and Shelley Kendall. In his statement, the Appellant related the following version of events. He admitted that he accompanied Davis to Ewing's residence. After an apparent robbery attempt, the Appellant ran. Davis then pulled up in a white Cadillac, which belonged to Lee's mother, with Ewing tied up in the front seat and Lee handcuffed in the backseat. The Appellant then accompanied Davis to a remote location in Nashville, where the victims were shot. However, the Appellant stated that he was not involved in the murders and thought Davis was going to release the victims unharmed.

According to the autopsy report, Ewing suffered three gunshot wounds to the head. One of the bullets, lodged at the base of the brain, was recovered. Ewing was also shot in the base of the neck, the front right shoulder, the right side of the abdomen, and the back of the right shoulder. Bullets were recovered in the upper portion of Ewing's arm, the left side of his back, and within the chest wall. The bullet recovered from Ewing's skull was determined to be a 9-millimeter caliber bullet, and the other three bullets were determined to be .45 caliber bullets. Lee's autopsy report reflected that he was shot three times in the head and once in the hand. One bullet was recovered

from Lee's hand and determined to be a 9-millimeter caliber bullet. No bullets were retrieved from the head wounds. Forensic testing revealed that the 9-millimeter caliber bullets were fired from the gun found underneath the couch cushion at the Herman Street apartment. The .45 caliber bullets were not connected to any weapon found in the Appellant's possession.

On May 10, 1996, a Davidson County Grand Jury returned an eight-count indictment against the Appellant: Count I - first degree premeditated murder of DeAngelo Lee; Count II - first degree felony murder of DeAngelo Lee; Count III - first degree premeditated murder of Greg Ewing; Count IV - first degree felony murder of Greg Ewing; Count V - especially aggravated kidnapping of DeAngelo Lee; Count VI - especially aggravated kidnapping of Greg Ewing; Count VII - especially aggravated robbery of DeAngelo Lee; and Count VIII - especially aggravated robbery of Greg Ewing. Pursuant to Tennessee Rule of Criminal Procedure 12.3(b), the State filed a notice to seek the death penalty on November 23, 1998, relying on the following aggravating factors: (1) prior violent felony convictions;[2] (2) murder committed for the purpose of avoiding arrest; and (3) murder committed in conjunction with a robbery or kidnapping. Tenn. Code Ann. § 39-13-204(i)(2), (6), (7) (Supp. 2002). After trial by jury, the Appellant was found guilty as charged on all counts.[3] The jury, finding the existence of all three aggravating factors and that these factors outweighed any mitigation factors presented by the defense, imposed a sentence of death for each murder conviction. Following a sentencing hearing on the robbery and kidnapping convictions, the Appellant received an effective sentence of death plus fifty years. The Appellant's motion for new trial was denied, and this timely appeal followed.

ANALYSIS

I. Constitutionality of Death Penalty Procedures

The Appellant argues that Tennessee's death penalty procedures are unconstitutional. His argument is twofold. First, the Appellant asserts that, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), his sentences of death are invalid because the aggravating circumstances relied upon by the State to secure the death penalty were not charged in the indictment. Second, he contends that, pursuant to *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), Tennessee's capital sentencing procedure "is unconstitutional because it bases a finding of eligibility for the death penalty on information that is neither subject to Sixth Amendment guarantees of confrontation and cross-examination, nor to evidentiary admissibility standards guaranteed by the Due Process Clause involving the elements of the offense."

[2] The Appellant's prior violent felony convictions include convictions for first degree murder, aggravated assault, and two counts of aggravated robbery.

[3] Count I was merged with Count II, and Count III was merged with Count VI.

A. Failure of Indictment to Allege Capital Offense

Relying upon *Apprendi* and *Ring*, the Appellant argues that the indictment fails to allege a capital offense and, therefore, his sentences of death are invalid. The issue of whether the *Apprendi* and *Ring* holdings are applicable to Tennessee's capital sentencing procedure has recently been addressed in *State v. Dellinger*, 79 S.W.3d 458, 466-67 (Tenn.), *cert. denied*, 123 S. Ct. 695 (2002), and *State v. Richard Odom*, No. W2000-02301-CCA-R3-DD (Tenn. Crim. App. at Jackson, Oct. 15, 2002), *appeal docketed*, No. W2000-02301-SC-DDT-DD (Tenn. 2002), and found to be meritless.

In *Apprendi*,[4] the United States Supreme Court held that:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions of [*Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999): "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalites to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. at 490, 120 S. Ct. at 2362-63 (quoting *Jones*, 526 U.S. at 252-53) (footnote omitted). The Tennessee Supreme Court, in *Dellinger*, 79 S.W.3d at 466-67, explained why *Apprendi* is not applicable to a capital case in Tennessee:

> 1. . . . The *Apprendi* holding applies to enhancement factors other than prior convictions. . . .
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> 2. The death penalty is within the statutory range of punishment prescribed by the legislature for first degree murder. Tenn. Code Ann. § 39-13-202(c)(1) (Supp. 2002). The *Apprendi* holding applies only to enhancement factors used to impose a sentence above the statutory maximum. *Apprendi*, 530 U.S. at 481, 120 S. Ct. at 2348. . . .
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> 3. District attorneys in Tennessee are required to notify capital defendants no less than thirty days before trial of the intent to seek the death penalty and must specify the aggravating circumstances upon which the State intends to rely during sentencing. Tenn. R. Crim. P. 12.3(b). Rule 12.3(b) therefore satisfies the requirements of due process and notice. . . .

[4] In *Apprendi v. New Jersey*, the United States Supreme Court struck down a New Jersey hate crime statute that permitted the judge to enhance the defendant's sentence above the maximum range if the crime was racially motivated. *Apprendi*, 530 U.S. at 496-97; 120 S. Ct. At 2366.

> 4. Tennessee's capital sentencing procedure requires that a jury make findings regarding the statutory aggravating circumstances. Tenn. Code Ann. § 39-13-204(f)(1), (i) (Supp. 2002). The *Apprendi* holding applies only to sentencing procedures under which judges sentence the defendants. *Apprendi*, 530 U.S. at 476, 120 S. Ct. at 2348.
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> 5. Tennessee's capital sentencing procedure requires that the jury find any statutory aggravating circumstance beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(f)(1), (i). The Tennessee statutes therefore comply with the "beyond a reasonable doubt" standard required by *Apprendi*. *Apprendi*, 530 U.S. at 476, 120 S. Ct. at 2348.

Dellinger, 79 S.W. 3d at 466-67. In accordance with *Dellinger*, we conclude that the principles of *Apprendi* do not apply to Tennessee's capital sentencing procedure. "Neither the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first degree murder prosecution." *Id.* at 467.

In *Ring*, the United States Supreme Court determined that Arizona's capital sentencing procedure violated the Sixth Amendment. *Ring*, 536 U.S. at __, 122 S. Ct. at 2443. The Arizona procedure at issue, Arizona Revised Statutes Annotated § 13-703, provided that the judge, in a separate hearing, determine "the presence or absence of the enumerated aggravating circumstances and any mitigating circumstances." *Id.* at __, 2434. (footnote omitted). The judge was then authorized to sentence the defendant to death "if there is at least one aggravating circumstance and there are no mitigating circumstances sufficiently substantial to call for leniency." *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-703(F)). In *State v. Richard Odom*, this Court discussed the application of *Ring* to Tennessee's capital sentencing procedures. *Odom*, No. W2000-02301-CCA-R3-DD. Twenty-nine states, including Tennessee, of the thirty-eight states with capital punishment, "commit sentencing decisions to juries." *Id.* (quoting *Ring*, 536 U.S. at __, 122 S. Ct. at 2442 n.6). Because the sentencing decision in Tennessee is submitted to a jury rather than a judge, we conclude that the holding of our supreme court in *Dellinger* is not affected by the decision of the United States Supreme Court in *Ring*. *Id.*

B. Guarantees of Confrontation and Cross-Examination

In his second constitutional argument, the Appellant relies on *Fell*, 217 F. Supp. 2d 469, for the proposition that Tennessee's capital sentencing procedure is unconstitutional because the aggravating factors necessary to sustain a death sentence are functional equivalents of the offense and, given the heightened safeguards applicable to a death penalty case, the lower evidentiary standards permitted at the sentencing phase violate the Fifth Amendment's Due Process Clause and the Sixth Amendment's right of confrontation and cross-examination. Tennessee's evidentiary standard governing the sentencing phase is functionally analogous to the federal statute at issue in

Fell. See 18 U.S.C.A. § 3593(c) (2000).[5] Tennessee Code Annotated § 39-13-204(c) provides the following evidentiary standards for the sentencing phase of capital proceedings:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction. Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of such

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[5] Section 3593(c) provides:

> Proof of mitigating and aggravating factors. Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

> evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. Such evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

Tenn. Code Ann. § 39-13-204(c).

Thus, the issue is whether there is some constitutional infirmity with the Tennessee evidentiary standards applicable to the sentencing phase findings. First, we note that federal district courts do not bind this court. The United States Supreme Court is the only federal court Tennessee courts are bound to follow. *Thompson v. State*, 958 S.W.2d 156, 174 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1997) (citing *State v. McKay*, 680 S.W.2d 447, 450 (Tenn. 1984), *cert. denied*, 470 U.S. 1034, 105 S. Ct. 1412 (1985); *State v. Bowers*, 673 S.W.2d 887, 889 (Tenn. Crim. App. 1984)).

Next, we decline to follow *Fell* and find the rationale of *United States v. Lavin Matthews*, 2002 U.S. Dist. LEXIS 25664, No. 00-CR-269 (D. N.D.N.Y. Dec. 31, 2002), more persuasive. The *Matthews* Court, finding that the federal evidentiary standard applicable to the sentencing phase was constitutional, reasoned as follows:

> This Court respectfully disagrees with *Fell*'s conclusion that "every element [of every crime set forth in the United States Code] must . . . be proven by evidence found to be reliable by application of the Federal Rules of Evidence." *Fell*, 217 F. Supp. 2d at 488. The Federal Rules of Evidence are not constitutionally mandated *per se*. The Supreme Court has cautioned against the wholesale importation of common law and evidentiary rules into the Due Process Clause of Constitution.
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> Due process only protects matters of "fundamental fairness." Without question, due process requires that every element of a crime be proven beyond a reasonable doubt in accordance with the accused's constitutional rights to a fair trial. While some of these principles of fairness are incorporated into the Federal Rules of Evidence, . . . in many ways the Federal Rules of Evidence go beyond constitutional requirements. Thus, subject to the requirements of due process, Congress has power to prescribe what evidence is to be received in the courts of the United States. Indeed, rules of evidence must sometimes yield to the constitution's mandate. Likewise, not all erroneous admissions of . . . evidence are errors of constitutional dimension. The introduction of improper evidence against a defendant does not amount to a violation of due process unless the evidence is so extremely unfair that

> its admission violates fundamental conceptions of justice. Thus, . . . even if Congress abolished . . . the entire Federal Rules of Evidence, the requirements of the Sixth Amendment's Confrontation Clause and the Fifth Amendment's Due Process Clause would fill the void to ensure the accused's right to a fair trial.

Matthews, 2002 U.S. Dist. LEXIS 25664, No. 00-CR-269 (internal citations omitted).

The challenged Tennessee statute does not eliminate the constitutional baseline for the admissibility of evidence in a criminal trial. Arguably, the State "did quite the opposite and expanded the defendant's ability to introduce evidence demonstrating why he or she should not be subjected to capital punishment." *Id.* The State "conscientiously chose to eliminate many of the strictures imposed upon the admissibility of evidence at the sentencing phase to permit the fact finder to consider 'the character and record of the individual offender and the circumstances of the particular offense' before deciding whether to impose a sentence of death." *Id.* (citations omitted). We recognize that the State is similarly afforded an expanded ability to introduce evidence to establish the aggravating factors supporting imposition of a death sentence. However, jurors are capable of performing their duty to make determinations of credibility and evaluate the trustworthiness of the evidence before them. *Id.* The jury can then perform its function as the trier of fact in filtering out the believable from the unbelievable. *Id.*

Based upon the foregoing and by analogy to *Matthews'* rationale of the federal statute, we conclude that the evidentiary standards contained in Tennessee Code Annotated § 39-13-204(c) are sufficient to enable the trial courts to exclude evidence at the sentencing phase that would run afoul of the constitutional right to a fair trial, including evidence that might deprive a defendant of his right to confrontation or cross-examination. Accordingly, this issue is without merit.

II. Speedy Trial

The Appellant argues that he was "denied his rights to a speedy trial and was unfairly prejudiced by the unwarranted delay between indictment and notice of the death penalty." As previously noted, the Appellant was indicted on March 10, 1996, and the State filed a notice of its intent to seek the death penalty on November 23, 1998. He submits that he was prejudiced by this delay in the following ways:

> First, the delay in filing the death penalty notice greatly hampered his ability to prepare a "death-defense" by assembling mitigation evidence and experts. Second, the delay in the trial was vital because crucial witnesses who were involved in this criminal episode, most notably Antonio Cartwright, had an inordinately long period of time in which to craft their putative testimony and make it favorable to themselves and most damaging to Defendant.

Initially, we note that this issue was not included in the Appellant's motion for new trial. *See* Tenn. R. App. P. 3(e). The general rule is that this court does not consider issues that are not raised

in the trial court. *State v. Hoyt*, 928 S.W.2d 935, 946 (Tenn. Crim. App. 1995). However, this court may "recognize errors pursuant to rule 52(b) that seriously affect the fairness, integrity or public reputation of judicial proceedings when necessary to prevent a miscarriage of justice." *State v. Adkisson*, 899 S.W.2d 626, 639-40 (Tenn. Crim. App. 1994) (footnotes omitted). Additionally, we are cognizant of our statutory obligation of review under Tennessee Code Annotated § 39-13-206 (1997) and the heightened standard of review generally applicable to convictions resulting in a sentence of death. *State v. Clarence C. Nesbit*, No. 02C01-9510-CR-00293 (Tenn. Crim. App. at Jackson, Apr. 22, 1997). Accordingly, within the context of a capital case, this court has jurisdiction to review the issues raised on appeal and we elect to review the same. *Id*. (citing *State v. James Blanton*, No. 01C01-9307-CC-00218 (Tenn. Crim. App. at Nashville, Apr. 30, 1996); *State v. Christopher S. Beckham*, No. 02C01-9406-CR-00107 (Tenn. Crim. App. at Jackson, Sept. 27, 1995)).

The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S. Ct. 2182, 2184 (1972). Likewise, the right to a speedy trial is guaranteed by Article 1, § 9 of the Tennessee Constitution. *State v. Simmons*, 54 S.W.3d 755, 758 (Tenn. 2001). The Tennessee legislature has codified this constitutional right at Tennessee Code Annotated § 40-14-101 (1997). Moreover, Tennessee Rule of Criminal Procedure 48(b) provides for the dismissal of an indictment "if there is unnecessary delay in bringing a defendant to trial[.]"

When a defendant contends that he was denied his right to a speedy trial, the reviewing court must conduct a four part balancing test to determine if this right was, indeed, abridged. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. This test includes consideration of (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice suffered by the defendant because of the delay. *Id*.; *see also State v. Bishop*, 493 S.W.2d 81, 84 (Tenn. 1973).

The right to a speedy trial attaches at the time of the actual arrest or formal grand jury action, whichever occurs first, and continues until the date of trial. *State v. Utley*, 956 S.W.2d 489, 493-94 (Tenn. 1997). The length of the delay between the arrest or grand jury action and trial is a threshold factor and, if that delay is not presumptively prejudicial, the other factors need not be considered. *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192. A delay of one year or longer "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 112 S. Ct. 2686, 2691 n. 1 (1992); *see also Utley*, 956 S.W.2d at 494. Contrary to the assertion of the Appellant, the date the State filed its notice to seek the death penalty is irrelevant in a speedy trial analysis. Accordingly, the appropriate dates in the present case are the Appellant's arrest date, March 6, 1996, as he was arrested prior to being indicted, and May 22, 2000, the day on which his trial began. This approximate four-year and two-month delay, while satisfying the requirement of presumptive prejudice, weighs only slightly in favor of the Appellant.

We are unable to conduct a meaningful review of the remaining *Barker* factors because no evidentiary proceedings were held in the trial court, as this issue is raised for the first time on appeal.

The Appellant was represented by counsel throughout these proceedings and, at no time, did he assert his right to a speedy trial. A defendant's assertion of his right to a speedy trial "is entitled to strong weight in favor of the defendant, while failure to assert the right [to a speedy trial] ordinarily will make it difficult to prove that the right has been denied." *Simmons*, 54 S.W.3d at 760 (citations omitted). The Appellant's prejudice argument focuses on the impairment of his ability to prepare a defense. We find no evidence in the record that the delay affected the Appellant's ability to prepare an appropriate defense. Trial was held one and a half years after the State filed notice of its intent to seek the death penalty, which was a sufficient amount of time for the Appellant to prepare a "death-defense." His contention that the delay allowed Cartwright to "craft [his] testimony so as to exculpate [himself] and condemn Defendant," is likewise without merit. There is no proof that the delay itself caused any change in Cartwright's testimony. Furthermore, although the Appellant was incarcerated until the time of trial, this is a capital proceeding and his incarceration was not the result of these proceedings alone. *See State v. G'Dongalay Parlo Berry and Christopher Davis*, No. M1999-00824-CCA-R3-CD (Tenn. Crim. App. at Nashville, Oct. 19, 2001) (involving the 1995 shooting death of a 12-year-old girl in a Nashville parking lot); *State v. Gdongalay Parlo Berry*, No. M1999-01901-CCA-MR3-CD (Tenn. Crim. App. at Nashville, Aug. 31, 2000) (involving two convictions for aggravated robbery of Tennessee State University students in 1996). In sum, although the Appellant has established a delay that is *prima facie* unjustified, he has, however, failed to demonstrate prejudice resulting from the delay.

III. Representation

First, the Appellant argues that "[t]he trial judge erred in denying the Defendant's motion for dual representation, in improperly influencing him to forego hybrid representation, and in allowing him to represent himself at the suppression hearing without deciding the dual representation motion."

A. Hybrid Representation

Both the United States and Tennessee Constitutions guarantee the right of an accused to self-representation or to representation by counsel. U.S. CONST. amend. VI; TENN. CONST. art. I, § 9; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527 (1975); *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984). The right to self-representation and the right to counsel have been construed to be alternative ones; that is, one has a right either to be represented by counsel or to represent himself, to conduct his own defense. *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999) (quoting *State v. Melson*, 638 S.W.2d 342, 359 (Tenn. 1982), *cert. denied*, 459 U.S. 1137, 103 S. Ct. 770 (1983)). "[W]aiver of one right constitutes a correlative assertion of the other. . . . [A] criminal defendant cannot logically waive or assert both rights. *State v. Burkhart*, 541 S.W.2d 365, 368 (Tenn. 1976) (quoting *United States v. Conder*, 423 F.2d 904, 908 (6th Cir. 1970)). Neither the United States Constitution nor the Tennessee Constitution grants the accused the right to "hybrid representation," *i.e.*, permitting both the defendant and counsel to participate in the defense. *Id*. at 371. It is entirely a matter of grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances. *Melson*, 638 S.W.2d

at 359. "Hybrid representation" should be permitted "sparingly and with caution and only after a judicial determination that the defendant (1) is not seeking to disrupt orderly trial procedure and (2) that the defendant has the intelligence, ability and general competence to participate in his own defense." *Burkhart*, 541 S.W.2d at 371. The length of a trial or the involvement of the death penalty does not *per se* constitute "exceptional circumstances." *Melson*, 683 S.W.2d at 359.

One of the most fundamental responsibilities of a trial court in a criminal case is to assure that a fair trial is conducted. *State v. Franklin*, 714 S.W.2d 252, 258 (Tenn. 1986) (citation omitted). Generally, the trial court, which has presided over the proceedings, is in the best position to make determinations regarding how to achieve this primary purpose, and absent some abuse of the trial court's discretion in marshalling the trial, an appellate court should not redetermine in retrospect and on a cold record how the case could have been better tried. *Id*. (citation omitted). The trial court, whose responsibility it is to ensure the orderly and fair progression of the proceedings, is in an excellent position to determine the legal assistance necessary to ensure a defendant's right to a fair trial. *Small*, 988 S.W.2d at 674. This determination will depend, in part, upon the nature and gravity of the charge, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the defendant. *Id.* (citing *People v. Gibson*, 556 N.E.2d 226, 233 (Ill. 1990)). The decision whether to permit "hybrid representation" rests entirely within the trial court's discretion and will not be overturned in the absence of a clear abuse of that discretion. *Id*.

In this case, the trial court denied the Appellant's request for "hybrid representation," finding that:

> With regard to the first [*Burkhart*] prong, the Court concludes that the defendant is not seeking to disrupt the proceedings. Therefore, this prong weighs in the defendant's favor. The second [*Burkhart*] prong, however, weighs against the defendant's request. The defendant is capable of understanding the proceedings and consulting with his attorneys when necessary. By his own admission, however, he is unfamiliar with the Rules of Evidence, the Rules of Criminal Procedure, etc. Further, having observed the defendant during the suppression hearing, the Court concludes that he is not qualified to competently participate in his own defense.
>
> Assuming arguendo that the defendant possesses the skills which are necessary to competently participate in his own defense, the Court would still decline his request to do so in this case. The Supreme Court has repeatedly discouraged trial courts from permitting hybrid representation, stating that it should be used "sparingly," "with caution," and "only in exceptional circumstances." *See Small*, 988 S.W.2d at 673. The Court finds that no such exceptional circumstances are present in this case.
>
> . . . [T]he defendant feels that his attorneys periodically failed to elicit facts which he deems pertinent. An attorney may have many reasons for declining to ask a particular question or elicit certain facts. . . . Allowing the defendant to usurp the

> professional judgment of his attorneys is extremely dangerous, particularly in a murder trial in which the defendant's life is at stake.
>
> In addition to considering the conflict which will undoubtedly arise between the strategies of the defendant and his attorneys, the Court also notes that the defendant's participation in his defense would likely result in the defendant presenting unsworn testimony which is not subject to cross-examination. Although the Court does not believe that the defendant would intentionally present such testimony, it is inevitable that he will do so. . . .

The trial court, applying *Burkhart*, found that the Appellant was not seeking to disrupt orderly trial procedure but could not competently participate in his own defense. We agree. It is apparent from the record that the Appellant lacked the skills to participate in his own defense. He admitted he was unfamiliar with criminal procedures and gave unsworn testimony at the suppression hearing. "Unsworn statements will not be permitted under any circumstances." *Burkhart* 541 S.W.2d at 371. Furthermore, as noted by the trial court, such an arrangement would have given rise to a conflict between the strategies of the Appellant and his attorneys. Accordingly, we conclude that the trial court did not abuse its discretion by denying the Appellant's motion because the Appellant failed to allege facts constituting any "exceptional circumstances," which justify his participation.

B. Self-Representation

Next, the Appellant contends that allowing the Appellant to represent himself at the suppression hearing was error because the trial court did not first determine that the Appellant knowingly and intelligently waived his right to counsel. Specifically, the Appellant argues that a proper waiver was not given because he believed he was operating under a hybrid representation arrangement. The right to represent one's self should be granted only after a determination by the trial court that the defendant is both knowingly and intelligently waiving the valuable right to assistance of counsel. Tenn. R. Crim. P. 44(a); *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023 (1938); *State v. Burkhart*, 541 S.W.2d 365, 368 (Tenn. 1976). First, we note that this issue is waived because neither the Appellant nor his attorneys objected to this arrangement. Tenn. R. App. P. 36(a) (nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error). Regardless of any waiver, the Appellant's argument is incorrect. On April 25, 2000, the Appellant filed a motion for hybrid representation and a motion to suppress his statement. On April 28, 2000, the trial court conducted a hearing on both motions. The trial court took the Appellant's request for hybrid representation under advisement and proceeded with the suppression hearing. Because the trial court had not ruled upon the Appellant's request for hybrid representation, the court permitted the Appellant and his attorneys to question the witnesses at the suppression hearing. Despite the trial court allowing a hybrid representation arrangement for the suppression hearing, only the Appellant conducted cross-examination. However, while the Appellant questioned witnesses, his attorneys were constantly passing him notes and talking with him. Furthermore, the Appellant's attorneys conducted direct examination of the

Appellant. We conclude that the Appellant was not deprived of his right to counsel at any time during the suppression hearing. Accordingly, no waiver was necessary and this issue is without merit.

IV. Motion to Suppress

The Appellant argues that the trial court erred by denying his motion to suppress his statement given to the police after his arrest because "the circumstances surrounding the giving of this statement [were] tainted with coercion and constitutional violations." Specifically, he contends that: (1) he invoked his Fifth Amendment right to counsel soon after his arrest and, therefore, all questioning should have ceased, and (2) his subsequent statement given at the police station was not voluntarily and knowledgeably given.

In reviewing a denial of a motion to suppress, this court looks to the facts adduced at the suppression hearing which are most favorable to the prevailing party. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). In considering the evidence presented at the hearing, this court extends great deference to the fact-finding of the suppression hearing judge with respect to weighing credibility, determining facts, and resolving conflicts in the evidence. *Id.; see also State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). Indeed, these findings will be upheld unless the evidence preponderates otherwise. *Daniel*, 12 S.W.3d at 423.

A. Miranda

The Appellant contends that, after his arrest at the Carter Avenue address, he invoked his "Fifth Amendment rights;" thus, all questioning should have ceased. Because questioning did not cease, he contends that the statement thereafter procured by Detectives Roland and Kendall should have been suppressed. Both the United States and Tennessee Constitutions protect a defendant from being compelled to give evidence against himself. U.S. CONST. amend. V; TENN. CONST. art. I, § 9. When a suspect makes an unequivocal request for an attorney, all interrogation must cease, unless the suspect himself initiates further conversation with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1981); *State v. Stephenson*, 878 S.W.2d 530, 545 (Tenn. 1994). Repeating the Miranda warning and obtaining a waiver is not compliance. *Edwards*, 451 U.S. at 484, 101 S. Ct. at 1884-85. However, the right to counsel must be claimed. An invocation of the right to counsel "'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209 (1991)). Whether the Appellant did or did not make an equivocal or unequivocal request for an attorney is a question of fact. *State v. Farmer*, 927 S.W.2d 582, 594 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1996).

In the present case, the trial court found the Appellant's Fifth Amendment claim to be without merit based upon the following rationale:

> Initially, the Court is of the opinion, based upon the testimony introduced at the hearing, as well as the defendant's videotaped statement, that the defendant was sufficiently advised of his rights as mandated by Miranda v. Arizona, 384 U.S. 436 (1966). The Court is of the opinion that the defendant was orally advised of his rights at the time of his arrest, at the Carter Avenue address, by Det. Kendall. Further, the Court is of the opinion that the defendant was again advised of rights immediately before making the videotaped statement and signed the written rights waiver. The Court does not believe that the defendant invoked his Fifth Amendment privilege against self incrimination, or that the defendant was in any way prevented from invoking any of his constitutionally protected rights. In so finding, the Court accredits the testimony of both Det. Roland and Det. Kendall. The detective's position is supported by the defendant's written waiver of his rights just prior to the interview.

Based upon the evidence presented at the suppression hearing, the trial court, accrediting the testimony of the detectives, found that the Appellant did not invoke his Fifth Amendment privilege against self-incrimination or was in any way prevented from doing so. The evidence does not preponderate against the trial court's findings. The Appellant argues that none of the officers specifically denied "the fact that Mr. Berry invoked his 'Fifth Amendment rights' soon after the police burst into the home." However, both Detectives Roland and Kendall testified that the Appellant was read his Miranda rights and, thereafter, voluntarily gave a statement, implying that the Appellant did not invoke his privilege against self-incrimination. The trial court is in the best position to determine the credibility of witnesses, and we attribute great weight to the trial court's determinations. *Odom*, 928 S.W.2d at 23. Accordingly, the Appellant is not entitled to relief on this issue.

B. Voluntary and Knowing Waiver

The Appellant argues that his statement "was not a product of a free, rational and deliberate choice" because "the police officers assaulted him at the time of arrest and demanded that he answer their questions." He contends that the assault is supported "by the fact that he had bruises under his eyes at the time he arrived at the police station." Furthermore, he submits that "at the station Detective Roland told defendant that he could send him away by just signing a piece of paper and that, if he did not talk, Defendant would never see his unborn son."

Inherent in the admissibility of the written statement is that the statement was voluntarily given by a defendant knowledgeable of his constitutional rights and accompanied by a valid and knowing waiver of those rights. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, (1966); *State v. Middlebrooks*, 840 S.W.2d 317, 326 (Tenn. 1992), *cert. dismissed*, 510 U.S. 124, 114 S. Ct. 651 (1993). In determining the admissibility of a confession, the particular circumstances of each case must be examined as a whole. *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996). A defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in

the constitutional sense. *Id*. (citations omitted). The primary consideration in determining the admissibility of the evidence is whether the confession is an act of free will. *State v. Chandler*, 547 S.W.2d 918, 920 (Tenn. 1977). A confession is not voluntary when "the behavior of the state's law enforcement officials was such as to overbear" the will of an accused and "bring about confessions not freely self-determined." *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980) (quoting *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 741 (1961)). With regard to the claim that a confession is involuntary, findings of fact made by the trial court after an evidentiary hearing on a motion to suppress are afforded the weight of a jury verdict, and an appellate court will not set aside the trial court's judgment unless the evidence contained in the record preponderates against the findings of the trial court. *Odom*, 928 S.W.2d at 22.

After a suppression hearing, the trial court found that, "based on the facts and circumstances of this particular case, that the defendant executed a knowing, voluntary and intelligent waiver of his constitutional rights prior to answering any questions by Detectives Roland and Kendall about his alleged involvement in the murders and related offenses." The trial court reasoned as follows:

> In so finding, the Court points to the testimony of Det. Kendall and Roland, the defendant's videotaped statement to the detectives, as well as the waiver form executed by the defendant. It is evident to the Court that the defendant understood exactly what he was doing and the repercussions thereof when he agreed to speak with the police. The defendant does not allege that he was intoxicated at the time or that he was otherwise incapable of making a knowing, voluntary, and intelligent waiver of his rights. Despite the testimony of the defendant, the Court does not believe that the defendant was subjected to such physical and mental abuse so as to overbear his will and render his waiver involuntary. The Court notes that the initial arrest of the defendant, at the Carter Avenue address, may have been done in an aggressive manner with weapons drawn. However, under the facts and circumstances of this particular case and in light of the charges which the detectives were investigating, an aggressive entrance and arrest, which leaves no uncertainty as to the defendant's arrest or the purpose of the arrest, was reasonable under the circumstances.
>
> Finally, as to the actual voluntariness of the defendant's statement, the . . . Court finds that the defendant's statement was the product of the defendant's free, rational, and deliberate choice. . . . The defendant was advised of his rights, waived those rights, executed a written waiver, and subsequently answered questions regarding the incident under no duress from the detectives. In this regard, the Court again accredits the testimony of both Detective Kendall and Roland regarding the circumstances of the interview. The Court finds no indication from the evidence submitted that he was compelled to provide any information to the police. Further, the defendant did not at any time refuse to answer questions or request the interview to cease. In sum, the Court is satisfied that the defendant's statement was voluntarily

given and that the tactics employed by the detectives prior to and during the interview were appropriate under the law.

In resolving the conflicting evidence, the trial court explicitly accredited the testimony of Detectives Roland and Kendall and discredited the Appellant's testimony. After making thorough factual findings regarding the credibility issues, the trial court denied the Appellant's motion to suppress. We are bound by the trial court's findings unless the evidence of record preponderates against them. In this case, the evidence supports the findings, and the findings themselves support the court's ruling. The Appellant signed a written waiver of rights form and gave a videotaped statement, during which he did not appear under duress. Furthermore, the bruises under the Appellant's eyes at the time he arrived at the police station do not support the conclusion that the Appellant was subject to mental and physical abuse by the detectives, as these bruises could have been inflicted at any time prior to the Appellant's arrest. This evidence was available to the trial court, and the court chose to discredit the Appellant's testimony that the bruises resulted from physical abuse by the detectives. As such, we must conclude that the trial court properly ruled that the Appellant's statement was admissible.

V. Voir dire

The Appellant contends that "the trial court abused its discretion in the jury selection process by improperly rehabilitating jurors who were properly excludable for cause, and improperly excluding other jurors who were or could be rehabilitated in regard to their reservations concerning the death penalty." Tennessee Rule of Criminal Procedure 24(b) gives the trial judge the right to excuse a juror for cause without examination of counsel. *State v. Hutchison*, 898 S.W.2d 161, 167 (Tenn. 1994), *cert. denied*, 516 U.S. 846, 116 S. Ct. 137 (1995) (citing *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989), *cert. denied*, 493 U.S. 1036, 110 S. Ct. 758 (1990)); *State v. Strouth*, 620 S.W.2d 467, 471 (Tenn. 1981), *cert. denied*, 455 U.S. 983, 102 S. Ct. 1491 (1982)). In determining when a prospective juror may be excused for cause because of his or her views on the death penalty, the standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985) (footnote omitted). The Supreme Court further observed that "this standard likewise does not require that a juror's biases be proved with 'unmistakable clarity.'" *Id.* However, the trial judge must have the "definite impression" that a prospective juror could not follow the law. *Hutchinson*, 898 S.W.2d at 167 (citing *Wainwright v. Witt*, 469 U.S. at 425-26, 105 S. Ct. at 853). Finally, the trial court's finding of bias of a juror because of his or her views concerning the death penalty are accorded a presumption of correctness, and the Appellant must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision. *Alley*, 776 S.W.2d at 518.

The Appellant challenges the following questions and responses of the prospective jurors:

1. Prospective Juror 102 - The Appellant argues that the trial court erred by "[b]rowbeating a juror who said that she could not consider a life sentence for murder

into saying that, in certain circumstances, she could consider a life with parole sentence." The record contains no evidence of "browbeating." Rather, the record reveals that the trial court asked reasonable questions to clarify inconsistent responses regarding sentencing options.

2. Prospective Juror 103 - The Appellant argues that the trial court erred by disregarding sworn answers on the jury questionnaire "which would lead to exclusion by explaining that the rehabilitation questions were 'just trying to get down to what they really think.'" On the questionnaire, Juror 103 disclosed that she could not consider a life sentence as a sentencing option. However, the trial court accepted the juror's informed clarification of that answer after she stated that she could follow the law and consider a life sentence as an option.

3. Prospective Jurors 106, 113, and 116 - The Appellant argues that the trial court erred in "[s]ummarily excusing jurors who answered negatively in regard to their ability to impose the death penalty without any discussion or attempt to 'get down to what they really think' which is what the judge did in regard to pro-death penalty jurors." After questioning, each of these jurors unequivocally stated that he/she could not impose the death penalty.

4. Prospective Jurors 110, 125, and 127 - The Appellant contends that the trial court went to great lengths to rehabilitate these jurors. First, Jurors 110 and 125 were not challenged for cause and, therefore, this issue is waived. Nonetheless, Jurors 110 and 125 stated that they could follow the law and consider imposing a life sentence, despite personal reservations. Concerning Juror 127, he was summarily excused because he stated he could not impose the death penalty under any circumstances.

5. Prospective Juror 118 - The Appellant contends that the trial court improperly rehabilitated Juror 118, "who stated at least twice that it would have to be 'extraordinary' to depart from the death penalty and that she started with the death penalty not a life sentence." This juror did not say she would start with the death penalty and only depart from a death sentence upon a showing of extraordinary mitigating circumstances. Juror 118 did state that she would impose the death penalty unless the mitigating circumstances were "extraordinary." Thereafter, upon questioning by the court, she stated that she could follow the law, *i.e.*, aggravating circumstances have to outweigh mitigating circumstances before imposition of the death penalty.

6. Prospective Juror 123 - The Appellant submits that the trial court "incorrectly advised him that the State would simply have to present 'more aggravating circumstances than there are mitigating circumstances.'" The Appellant also contends that it was error to accept Juror 123 because, on the questionnaire, this juror answered that the death penalty was appropriate in all murder cases. In response to

this answer, the trial court stated, "it concerned me, because I didn't think that answer was what we were looking for, for people to be on the Jury. But I think that, maybe, he didn't get that question exactly clear. And he did qualify that[.] . . ." First, the trial court did not improperly advise the juror on the procedure for imposing the death penalty; rather, the trial court advised that a death sentence could only be imposed after a determination that the aggravating factors outweighed the mitigating factors. Second, the trial court sought clarification of the juror's answer on the questionnaire. The trial court was satisfied that this juror adequately explained his answer.

7. Prospective Jurors 129, 132, and 142 - The Appellant contends that the trial court improperly rehabilitated "jurors who rejected life with parole punishment and voiced opinions that minimum penalty for murder must be life without parole by asking leading questions[.] . . ." First, this issue is waived because these jurors were not challenged for cause. Regardless of waiver, each of these jurors stated that they would follow the law and consider all three sentencing options, including a life sentence.

8. Prospective Juror 143 - The Appellant argues that it was error to accept this juror because he stated that "he would reject environment as a mitigating factor." While he did express some reservations about environment being a mitigating factor, the trial court accepted him because he said he would consider the mitigating factors offered and did not dismiss environment as a mitigating circumstance completely.

9. Prospective Juror 156 - The Appellant contends that it was error to ask Juror 156 "'I mean you wouldn't consider it all?' when defense gets answer that juror said he would 'never' consider environment and thus promoting the juror to the 'right' answer." Because there was no challenge for cause, this issue is waived. Regardless, when questioned by the Appellant, Juror 156 stated he could not consider environment as a mitigating circumstance. Then, the trial court explained the sentencing procedure to the juror, and the juror stated he could follow the law and consider environment in mitigation.

10. Prospective Juror 188 - The Appellant assigns as error "[t]elling defense counsel 'hold on a minute' as counsel solicited juror opinion that there was 'no way' juror could impose life sentence or life without parole for cold-blooded murder, and then lecturing juror enough so that juror yielded and gave the acceptable response." This issue is waived because the Appellant did not challenge this juror for cause. In any event, the trial court did not lecture but, rather, intervened to clarify a point of confusion. Thereafter, the juror stated he understood and could follow the law.

11. Prospective Juror 190 - The Appellant claims that the trial court erred in rehabilitating this juror by "[i[ntervening with the purpose of curing a juror's

admission that 'there's no way in the world' he could consider environment as a mitigating factor with the platitude 'I'm not trying to talk you into . . .[.]'" Again, this issue is waived because the juror was not challenged for cause. After stating that he would not consider environment as a mitigating factor, the trial court asked Juror 190 to clarify his response. The juror then stated that he would consider it and give it the weight it deserves.

12. Prospective Juror 193 - The Appellant submits that the trial court erred by "[t]alking a juror into saying that she would follow the law when the juror indicated that the only mitigating factor she could consider would be mental problems and abuse. After finally getting the right response, the judge says 'that's all I need to know.'" The trial court intervened and explained death penalty sentencing procedure after Juror 193 gave some inconsistent answers regarding mitigating factors. The juror then stated she could follow the law.

After reviewing the answers and responses of the challenged jurors, we conclude that the respective jurors were either properly rehabilitated or their answers left "no leeway for rehabilitation." *Strouth*, 620 S.W.2d at 471; *see also Alley*, 776 S.W.2d at 517-18. In each instance, the prospective juror was extensively questioned as to whether they could apply the law to the evidence and consider all forms of punishment in this case. As noted by the trial court, the court "distributed a jury questionnaire, allowed the parties to question each juror individually, provided the [Appellant] with a jury consultant, and made every effort to select a fair and impartial jury." There is no error.

VI. Gang Evidence

The Appellant argues that admission of evidence regarding his "association and membership in the Gangster Disciples" violated Tennessee Rule of Evidence 404(b) and constituted reversible error. Admissible proof must satisfy the threshold determination of relevancy mandated by Tennessee Rule of Evidence 401, which defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Rule 403 adds that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. Finally, Rule 404 deals with "character evidence." Subsection (b) of this rule provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). However, the same subsection further sets out that such evidence may be allowed "for other purposes" if the following conditions are met prior to admission of this type of proof:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Id. Providing further clarification concerning the second requirement, "other purposes" have been defined to include: (1) motive; (2) intent; (3) guilty knowledge; (4) identity of the defendant; (5) absence of mistake or accident; (6) a common scheme or plan; (7) completion of the story; (8) opportunity; and (9) preparation. *State v. Robert Wayne Herron*, No. M2002-00951-CCA-R3-CD (Tenn. Crim. App. at Nashville, Jan. 22, 2003) (citing *Collard v. State*, 526 S.W.2d 112, 114 (Tenn. 1975); NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 404.6 (3d ed. 1995)); *see also* Advisory Commission Comments, Tenn. R. Evid. 404; *State v. Parton*, 694 S.W.2d 299, 302 (Tenn. 1985); *Bunch v. State*, 605 S.W.2d 227, 229 (Tenn. 1980); *State v. Jones*, 15 S.W.3d 880, 894 (Tenn. Crim. App. 1999), *perm. to appeal denied*, (Tenn. 2000). Should a review of the record indicate that the trial court substantially complied with the requirements of Rule 404(b), the trial court's admission of the challenged evidence will remain undisturbed absent an abuse of discretion. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997) (citation omitted).

In the order denying the Appellant's motion for new trial, the trial court made the following findings concerning the admission of gang-related testimony:

Typically, the Court would evaluate such an allegation by weighing the probative value of the testimony against the possible prejudice to the defendant. However, such an evaluation is not necessary in this case. Instead, the Court concludes that defense counsel made a tactical decision to allow this testimony, which supported their theory of the case. Counsel may not now seek relief merely because that strategy was unsuccessful. . . .

[T]he Court anticipated that one of the parties might wish to delve into gang-related issues during the course of this trial.

The Court first noticed a reference to the gang during the hearing on the defendant's motion to suppress his statement to the police. Although the defendant's statement contained multiple gang-related references, defense counsel did not object to the statement on that basis. Instead, they chose to attack the admissibility of the statement on other grounds. When the Court rejected those arguments, defense counsel did not request that the statement be redacted. . . .

The first witness to mention the gang in the jury's presence was Antonio Cartwright. Prior to this testimony, the Court requested a bench conference. During its discussions with counsel for the State and the defendant, the Court suggested that

> it might be inappropriate to make any references to the gang. In response, the State noted that the defendant made numerous gang references in his statement to the police and that defense counsel had not sought redaction of those references. The State also stated that it merely intended to question Cartwright regarding essentially the same information the defendant provided during his statement.
>
> During this discussion, defense counsel made no effort to echo the Court's concerns, object to the proposed testimony, or request that the defendant's statement be redacted. Because defense counsel raised no objection to the proposed testimony, which did not appear to be inconsistent with his theory of the case, the Court granted the State's request to present a limited amount of testimony concerning the gang. . . .
>
> Defense counsel failed to object to the testimony regarding gangs. Indeed, counsel elicited much of it themselves and used it to support their theory of the case. Through this testimony as well as the defendant's statement to the police, counsel sought to establish that Davis perpetrated the offense, that the defendant was present at the scene of the crime but did not participate in the offenses, that due at least in part to the presence of Davis and possibly other gang members the defendant was afraid to leave the scene, and that the evidence would have exonerated the defendant if the police had properly collected and tested it.
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> Given these circumstances, the Court finds that counsel made a tactical decision to allow this testimony. As such, the defendant is not entitled to relief.

We agree with the trial court that the Appellant has waived consideration of this issue. At no point did trial counsel object to these comments. The trial court, upon its on accord, requested a bench conference to discuss the admissibility of gang-related testimony. During this discussion, trial counsel made no attempts to object to this type of evidence. Furthermore, as noted by the trial court, trial counsel elicited much of the testimony themselves in order to support a defense theory of facilitation, *.i.e.*, co-defendant Davis was the leader of the gang and, therefore, the Appellant was afraid to leave the scene. Because no objection was entered, the trial court did not conduct a Rule 404(b) hearing and, without any such findings, we are unable to preform any meaningful appellate review of the issue. Additionally, the trial court gave a limiting instruction regarding the purposes for which the jury could consider the gang-related testimony. An appellate court must presume that the jury followed the instruction given by the trial court. *State v. Gilleland*, 22 S.W.3d 266, 273 (Tenn. 2000) (citation omitted). Based on the foregoing, we find that the Appellant has waived this issue. Tenn. R. App. P. 36(a) (nothing in this shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error).

VII. Hearsay Statement

In his next assignment of error, the Appellant contends that the trial court erred in allowing Antonio Cartwright to testify about a conversation between the Appellant and co-defendant Davis, "where the [two men] were alleged to have planned a robbery of the victims." Specifically, he argues that this evidence constituted inadmissible hearsay. The testimony at issue is as follows:

Q. Did you hear any discussion between Mr. Berry and Mr. Davis and yourself?

A. Yes, ma'am.

Q. What was that discussion about?

A. About a robbery.

Q. And what was said to you about the robbery?

MR. GIBSON: Object to hearsay.

THE COURT: Well, we need to identify who this is that he's talking about?

Q. (By General Miller) Who was having this discussion, first of all?

A. Christopher Davis, Gdongalay Berry.

Q. And were they having a discussion in your presence or were they actually talking to you about it.

A. In my presence.

Q. Okay. And were they asking you questions or did you participate in a conversation at some point?

A. I didn't really participate in the conversation at that time; no ma'am.

THE COURT: You were present when this conversation was going on between Mr. Berry and Mr. Davis; is that what you're saying?

THE WITNESS: Yes, sir.

THE COURT: All right. I'm going to overrule the objection. He was present and the defendant was present. It was a conversation in this presence. He can testify about it.

MR. GIBSON: Your Honor, shouldn't he only be able to testify to what my client said, not Christopher Davis?

THE COURT: I think he can testify about the whole conversation between people that were allegedly co-conspirators in a – in an alleged robbery that was being planned.

So go ahead, please.

Q. (By General Miller) What was the conversation about, Mr. Cartwright?

A. It was about a robbery.

Q. Okay. And did you know who the robbery was supposed to happen to?

A. Yes, ma'am; I did.

Q. And who was that?

A. Greg Ewing and DeAngelo Lee.

Q. Okay. And what was said about the robbery?

A. Uh –

Q. What was it to be a robbery of?

A. The guns and a car.

Q. Guns and a car?

A. Yes, ma'am.

Q. Okay. And how was this robbery supposed to take place?

A. They were supposed to go get some guns, and when Chris give the signal and cocked the gun, G-Berry is supposed to have come out.

Q. All right. And did Mr. G – Mr. Gdongalay Berry make any specific remarks about the robbery?

A. Yes. If we rob 'em, we gotta kill 'em.

Q. Did he say why?

A. Because they know us.

Q. Because they know us?

A. Yes, ma'am.

Q. And that's what Mr. Berry said?

A. Yes, ma'am.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is not admissible except as provided by the rules of evidence or otherwise by law. Tenn. R. Evid. 802. Pursuant to Rule 803(1.2)(E), Tennessee Rules Evidence, a statement that is hearsay is allowed against a party when made "by a co-conspirator of a party during the course of and in furtherance of the conspiracy." A conspiracy is defined as a combination between two or more persons to do a criminal or unlawful act or a lawful act by criminal or unlawful means. *State v. Lequire*, 634 S.W.2d 608, 612 (Tenn. Crim. App. 1981), *perm. to appeal denied*, (Tenn. 1982) (citation omitted). Declarations of a co-conspirator that would otherwise be inadmissible may be offered as proof, when the following conditions are met: (1) there is evidence of the existence of the conspiracy and the connection of the declarant and the defendant to it; (2) the declaration was made during the pendency of the conspiracy; and (3) the declaration was made in furtherance of the conspiracy. *State v. Gaylor*, 862 S.W.2d 546, 553 (Tenn. Crim. App. 1992), *perm. to appeal denied*, (Tenn. 1993) (citations omitted). A "statement may be in furtherance of the conspiracy in countless ways. Examples include statements designed to get the scheme started, develop plans, arrange for things to be done to accomplish the goal, update other conspirators on the progress, deal with arising problems, and provide information relevant to the project." *State v. Carruthers*, 35 S.W.3d 516, 556 (Tenn. 2000) (citation omitted). If a conspiracy is shown to exist, the co-conspirator's statement is admissible even though no conspiracy has been formally charged. *Lequire*, 634 S.W.2d at 612 n.1.

For admissibility purposes, the standard of proof required to show the existence of the prerequisite conspiracy is proof by a preponderance of the evidence. *State v. Stamper*, 863 S.W.2d 404, 406 (Tenn. 1993). The State only has to show an implied understanding between the parties, not formal words or a written agreement, in order to prove a conspiracy. *Gaylor*, 862 S.W.2d at 553. "The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprises." *Id.* (citation omitted).

The trial court in the present case determined that a conspiracy existed between the Appellant and co-defendant Davis and that the statements were in furtherance of that conspiracy.[6] The trial court based its finding upon the fact that the Appellant "and Davis discussed the robbery and murders they intended to commit, and executed their plan shortly thereafter." We believe that this constitutes adequate proof for the trial court to find by a preponderance of the evidence that a conspiracy existed between the Appellant and Davis. Thus, the evidence was admissible under Rule 803(1.2)(E).

VIII. Closing Argument

The Appellant contends that "the State made an inappropriate religious argument during its closing argument." During closing argument, the prosecutor made the following comment:

> Well, we talked a little bit in voir dire about crimes. You know, yeah, it would be nice if this crime had occurred in the parking lot of the Baptist Church down – downtown, about 10 o'clock, when it was full of good, solid citizens who could come into court and wouldn't have to explain the sentence that they were currently serving or a sentence that was pending against them. We don't have that in this case, because none of the parties involved are people that attended church on Sunday during this part of their life, but that doesn't mean that their lives are not precious. That doesn't mean that Mr. Berry's life is not precious. But he should be held accountable for this crime.

Closing arguments are an important tool for both parties during the trial process; consequently, attorneys are usually given wide latitude in the scope of their arguments. *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994) (citation omitted). Trial courts are accorded wide discretion in their control of those arguments. *State v. Zirkle*, 910 S.W.2d 874, 888 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1995) (citation omitted). Moreover, a trial court's finding will not be reversed absent an abuse of that discretion. *State v. Payton*, 782 S.W.2d 490, 496 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1989) (citation omitted). Such scope and discretion, however, is not completely unfettered. It is settled law in this state that references to biblical passages or religious law during a criminal trial are inappropriate. *State v. Middlebrooks*, 995 S.W.2d 550, 559 (Tenn. 1999) (citation omitted); *State v. Stephenson*, 878 S.W.2d 530, 541 (Tenn. 1994); *Kirkendoll v. State*, 281 S.W.2d 243, 254 (Tenn. 1955). Such references, however, do not constitute reversible error unless the Appellant can clearly establish that they "'affected the verdict to the prejudice of the defendant." *Middlebrooks*, 995 S.W.2d 559 (quoting *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965)). In making this determination, we must consider: 1) the conduct complained of, viewed in light of the facts and circumstances of the case; 2) the curative measures

[6] The trial court also found that the testimony was admissible as an "adoptive admission" pursuant to Tennessee Rule of Evidence 803(1.2)(B). However, we conclude that the testimony clearly falls within the co-conspirator exception to the hearsay rule and, therefore, find it unnecessary to address whether the testimony is also admissible as an "adoptive admission."

undertaken by the court and the prosecution; 3) the intent of the prosecutor in making the improper arguments; 4) the cumulative effect of the improper conduct and any other errors in the record; and 5) the relative strength and weakness of the case. *Id*. at 560 (citing *Bigbee*, 885 S.W.2d at 809).

We note that the Appellant did not contemporaneously object to the prosecutor's statements during closing argument. Therefore, the issue has been waived. Tenn. R. App. P. 36(a). It has been firmly established that objections must be made to an improper jury argument in order to preserve the issue for appellate review; otherwise, any improper remarks by the State would afford no ground for a new trial. *State v. Compton*, 642 S.W.2d 745, 747 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1982).

Regardless of any waiver, we find that this issue has no merit. In its order denying the Appellant's motion for new trial, the trial court found no error during closing argument based upon the following rationale:

> The Court recognizes that it is improper for attorneys to make religious references during their closing arguments. . . . However, the Court disagrees that the State did so in this case. Several of the State's witnesses had prior convictions and/or were facing criminal charges at the time they testified. Moreover, the victims were selling guns at the time of their deaths, and there was evidence that one of them had taken drugs at some point prior to being killed. During its closing argument, the State simply acknowledged that its victims and witnesses may have been less-than-perfect, but argued that these facts did not render the defendant any less culpable. The Court finds this argument was proper.

We agree with the trial court that the prosecutor's comments were not inappropriate references to biblical passages or religious law. As noted by the trial court, the comment was made in order to recognize the type of people involved in the case and to emphasize that the Appellant should still be held accountable for his illegal actions, not to interject a biblical passage or religious law into closing argument. Furthermore, the Appellant has failed to show any prejudice resulting from the comments. The case against the Appellant was relatively strong, as he admitted he was present at the construction site when the victims were murdered.

IX. Flight Instruction

The Appellant next contends that the trial court's use of a Tennessee Pattern Jury Instruction on flight was unwarranted by the evidence. Before review of the issue as presented, we note that, when the State requested this instruction, the Appellant did not object and, therefore, this is waived. Tenn. R. App. 36(a). Nonetheless, given our heightened standard of review generally applicable to convictions resulting in a sentence of death, we proceed to examine the issue on the merits.

Following the presentation of the evidence, the trial court gave the jury the following instruction regarding flight:

> The flight of a person accused of a crime is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt. Flight is the voluntary withdrawal of oneself for the purpose of evading arrest or prosecution for the crime charged. Whether the evidence presented proves beyond a reasonable doubt that the defendant fled is a question for your determination.
>
> The law makes no precise distinction as to the manner or method of flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.
>
> If the flight is proved, the fact of flight alone does not allow you to find that the defendant is guilty of the crime alleged. However, since flight by a defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of the defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered, or by the facts and circumstances of the case.
>
> Whether there was flight by the defendant, the reasons for it, and the weight to be given to it, are questions for you to determine.

7 TENNESSEE PRACTICE, TENNESSEE PATTERN JURY INSTRUCTIONS - CRIMINAL 42.18 (Comm. of the Tenn. Judicial Conference 5th ed. 2000). This pattern jury instruction is a correct statement of the applicable law and has been previously cited with approval by our court. *See, e.g., State v. Kendricks*, 947 S.W.2d 875, 885-86 (Tenn. Crim. App. 1996), *perm. to appeal denied*, (Tenn. 1997); *State v. Terry Dean Sneed*, No. 03C01-9702-CR-00076 (Tenn. Crim. App. at Knoxville, Nov. 5, 1998), *perm. to appeal denied*, (Tenn. 1999). In order for a trial court to charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction. Sufficient evidence supporting such instruction requires "'both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community.'" *State v. Burns*, 979 S.W.2d 276, 289-90 (Tenn. 1998) (quoting *Payton*, 782 S.W.2d at 498).

Here, the Appellant both ran from the apartment, while being chased by police officers, and alluded the police for approximately one week before being apprehended. This evidence clearly supported the trial court's instruction on flight. The Appellant contends, however, that the trial court erred in giving the flight instruction because the instruction

> may only be given when the defendant attempts to withdraw himself for the purpose of evading arrest for the specific crime that has been charged. Because it is impossible to determine from these facts whether the Defendant fled to evade arrest

> for the charged crimes or for some other reasons, the court erred in giving the flight instruction.

We do not find the Appellant's argument persuasive. The trial court found that giving a flight instruction was not error based upon the following rationale:

> Following the murders, the defendant fled the scene of the crime, slept in a hotel as opposed to his home or the Herman Street residence, ran from the police officers the next morning, and remained at large for approximately one week. Given these circumstances, the Court finds that an instruction on flight was appropriate.
>
> The defendant contends that the instruction was inappropriate because he may have been fleeing as a result of his involvement in the murder of Adrian Dickerson as opposed to the double homicide at issue in this case. Although the officers from whom the defendant fled were unaware of his involvement in the double homicide, the defendant was not privy to that information. The defendant fled immediately upon encountering the officers, and it is reasonable to assume that he did so in an attempt to evade arrest for any and all crimes he had previously committed.
>
> The record does not support a theory that the defendant fled solely in an effort to evade arrest for the murder of Adrian Dickerson. Indeed, given the fact that the double homicide occurred mere hours before the defendant's encounter with the officers, the defendant likely assumed the officers were investigating that incident. In any event, the defendant has not provided the Court with any authority which prohibits a flight instruction when a defendant has multiple motives for fleeing. The Court finds this issue to be without merit.

Based upon the facts of the case, we conclude, as did the trial court, that the jury could infer that the Appellant fled due to his involvement in any and all crimes he had previously committed. A flight instruction is not prohibited when there are multiple motives for flight because to determine otherwise would prevent a flight instruction when a defendant evades arrest for numerous crimes. A defendant's specific intent for fleeing a scene is a jury question. Accordingly, the trial court properly instructed the jury on flight.

X. Sufficiency of the Evidence

The Appellant also challenges the sufficiency of the evidence supporting his convictions. Specifically, he contends that, "[a]t most, the evidence establishes that [he] was guilty of facilitation." We disagree.

A jury conviction removes the presumption of innocence with which a defendant is cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the

evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Likewise, it is not the duty of this court to revisit questions of witness credibility on appeal, that function being within the province of the trier of fact. *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. 1999); *State v. Burlison*, 868 S.W.2d 713, 719 (Tenn. Crim. App. 1993). Instead, the Appellant must establish that the evidence presented at trial was so deficient that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). As in the case of direct evidence, the weight to be given circumstantial evidence and "the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *Marable v. State*, 313 S.W.2d 451, 457 (Tenn. 1958) (citation omitted).

The trial court properly charged the jury with regard to criminal responsibility. A person is criminally responsible for an offense if the offense is committed by the person's own conduct or by the conduct of another for which the person is criminally responsible or both. Tenn. Code Ann. § 39-11-401(a) (1997). A person is criminally responsible for the conduct of another if: "Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2) (1997). Facilitation, however, involves the following: "A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under Tenn. Code Ann. § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a) (1997). Facilitation of a felony is a lesser degree of criminal responsibility than that of criminal responsibility for the conduct of another. *State v. Burns*, 6 S.W.3d 453, 470 (Tenn. 1999). The Sentencing Commission Comments expressly characterize facilitation as "a lesser included offense [of criminal responsibility] if the defendant's degree of complicity is insufficient to warrant conviction as a party." Tenn. Code Ann. § 39-11-403, Sentencing Commission Comments. The facilitation statute is premised upon a theory of vicarious responsibility because it applies to a person who facilitates criminal conduct of another by knowingly furnishing substantial assistance to the perpetrator of a felony, but who lacks the intent to promote or assist in, or benefit from, the felony's commission. *Id.*

A. Premeditated Murder

First degree murder is defined as "a premeditated and intentional killing of another[.]" Tenn. Code Ann. § 39-13-202(a)(1) (Supp. 2002). The statute defines premeditation as follows:

> "Premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act

> itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Tenn. Code Ann. § 39-13-202(d); *State v. Sims*, 45 S.W.3d 1, 8 (Tenn. 2001). As noted above, first degree murder also requires that the killing of another be intended. Intentional conduct refers to a person who acts intentionally with respect to a result of the conduct, when it is the person's conscious objective or desire to cause the death of the alleged victim. Tenn. Code Ann. § 39-11- 106(a)(18) (1997).

The element of premeditation is a question for the jury and may be inferred from the circumstances surrounding the killing. *State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993), *perm. to appeal denied*, (Tenn. 1994). Because the trier of fact cannot speculate as to what was in the killer's mind, the existence of facts of premeditation must be determined from the Appellant's conduct in light of the surrounding circumstances. *See generally State v. Johnny Wright*, No. 01C01-9503-CC-00093 (Tenn. Crim. App. at Nashville, Jan. 5, 1996) (citation omitted). Although there is no strict standard governing what constitutes proof of premeditation, several relevant circumstances are helpful, including: the use of a deadly weapon upon an unarmed victim; the fact that the killing was particularly cruel; a declaration by a defendant of his intent to kill; evidence of the procurement of weapon; the making of preparations before the killing for the purpose of concealing the crime; and calmness immediately after the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998) (citation omitted). *State v. Bordis*, 905 S.W.2d 214, 222 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn. 1995), provides that a jury faced with resolving this question also may utilize facts raising the inference of a motive and/or the implementation of a preconceived design.

After reviewing all the evidence in the record in the light most favorable to the prosecution, we cannot say that no reasonable trier of fact could have found the Appellant guilty of first degree murder beyond a reasonable doubt. The jury was in the best position to view the witnesses and the evidence and determine, based upon that proof, whether the Appellant intentionally and with premeditation murdered Ewing and Lee. The proof produced at trial established that the Appellant and Davis planned to meet with the victims to purchase assault rifles for $1,200.00. Prior to meeting with the victims, the Appellant and Davis decided to rob the victims of guns and their vehicle. The Appellant stated, “If we rob ‘em, we gotta kill ‘em. . . . Because they know us.” When the Appellant and Davis met with the victims, they were carrying guns and a black bag containing handcuffs, a rope, and duct tape. The victims were then taken to a remote construction site and made to remove articles of their clothing. They were shot numerous times; the majority of which were gunshot wounds to the head. The Appellant and Berry then returned to the Herman Street residence in the victims’ Cadillac, removed the guns from the car, and placed them inside. They burned the Cadillac and spent the night in a local hotel. When the Appellant and Davis encountered the police the following morning, the Appellant was carrying a rifle, and both men fled. The Appellant

remained at large for approximately one week. The physical evidence established that the 9 mm pistol found at the Herman Street residence was one of the weapons which produced the fatal wounds. Finally, the record established several motives for the murder. *See Ivey v. State*, 360 S.W.2d 1, 3 (Tenn. 1962) (holding that evidence tending to show motive is always relevant, particularly in cases built wholly or partially on circumstantial evidence).

These facts, which include the execution-style murders of the victims, planning activities prior to the killing, the Appellant's declaration that the victims must be killed because they could identify the Appellant and Davis, multiple motives for murder, the burning of the victims' Cadillac, the subsequent fleeing from police officers, and the Appellant's admission that he was present at the scene, support the jury's finding of premeditation. After viewing the evidence in the light most favorable to the State, we conclude that a reasonable trier of fact could have found the Appellant guilty of the first degree premeditated murders of Ewing and Lee based upon either the Appellant's own conduct or under a theory of criminal responsibility for the conduct of co-defendant Davis or both. We agree with the trial court that "the evidence does not support that the [Appellant was] innocent of any wrongdoing or that he [was] merely guilty of facilitation."

B. Felony Murder and Especially Aggravated Robbery

Felony murder is defined as "the killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, or aircraft policy." Tenn. Code Ann. § 39-13-202(2). Robbery is the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401 (1997). In order for the robbery to become especially aggravated robbery, the robbery must be accomplished with a deadly weapon and the victim must suffer serious bodily injury. Tenn. Code Ann. § 39-13-403 (1997).

Antonio Cartwright testified that the Appellant and Davis discussed their plan to rob and murder the victims a few hours before executing it. The evidence overwhelmingly established that the Appellant and Davis took the victims' car, rifles, jewelry, clothing, and other items. This taking was accomplished with a deadly weapon, and the victims suffered death as a result of the Appellant's actions. Accordingly, the evidence was sufficient to find the Appellant guilty of the especially aggravated robberies and resulting felony murders of Ewing and Lee.

C. Especially Aggravated Kidnapping

Especially aggravated kidnapping is false imprisonment accomplished with a deadly weapon or where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-305(a)(1), (4) (1997). False imprisonment occurs when a person "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Tenn. Code Ann. § 39-13-302 (1997).

The evidence showed that Davis left the Herman Street residence carrying a black bag, which contained handcuffs, rope, and duct tape. At some point during the evening, the victims were bound

and transported to the construction site. Furthermore, rope was found at the murder scene. While it is unclear who actually bound the victims, the Appellant actively participated in the planning, preparation, and execution of the robbery, kidnapping, and murder of the victims. The evidence is sufficient to support the especially aggravated kidnapping convictions under a theory of criminal responsibility.

XI. Victim Impact Testimony

The Appellant's challenge to the introduction of victim impact evidence is limited to the testimony of Brenda Ewing Sanders, mother of the victim Ewing. The victim impact testimony complained of is as follows:

> Q. Until you were sitting in the courtroom the other day and heard the testimony of Dr. Levy, did you have any idea of how many times your son had been shot?
>
> A. No, I had no idea that my son was shot seven times.
>
> Q. The police didn't tell you that?
>
> A. No.
>
> Q. And until you heard Mr. Berry's statement played for you, did you realize that your son was screaming for his life before he was killed?
>
> A. I didn't, but that was something that I've always wanted to find closure of, of what he was saying when this was happening to him, if he was even asking, just tell my mother something.

The trial court concluded that "Sanders' testimony did not exceed the scope of appropriate victim impact testimony." The Appellant contends that this testimony does not address any "unique characteristics" about the victim; rather, it offers "characterizations and opinions about the crime." We note that this issue is waived because neither the Appellant nor his attorneys objected to Sanders' testimony during the jury-out hearing or her testimony. Tenn. R. App. P. 36(a). Nonetheless, we proceed to address the merits of the Appellant's argument.

In *State v. Nesbit*, 978 S.W.2d 872, 889 (Tenn. 1998), our supreme court held that victim impact evidence and prosecutorial argument is not barred by the federal and state constitutions. *See also Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) (holding that the Eighth Amendment erects no *per se* bar against the admission of victim impact evidence and prosecutorial argument); *State v. Shepherd*, 902 S.W.2d 895, 907 (Tenn. 1995) (holding that victim impact evidence and prosecutorial argument are not precluded by the Tennessee Constitution). Notwithstanding the holding that victim impact evidence is admissible under Tennessee's death penalty sentencing scheme, the introduction of such evidence is not unrestricted. *Nesbit*, 978 S.W.2d

at 891. Victim impact evidence may not be introduced if (1) it is so unduly prejudicial that it renders the trial fundamentally unfair, or (2) its probative value is substantially outweighed by its prejudicial impact. *Id.* (citations omitted); *see also State v. Morris*, 24 S.W.3d 788, 813 (Tenn. 2000) (Appendix), *cert. denied*, 531 U.S. 1082, 121 S. Ct. 786 (2001).

"Victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family." *Nesbit*, 978 S.W.2d at 891(footnote and citations omitted). Admission of a victim's family members' characterizations and opinions about the crime, the Appellant, and the appropriate sentence is improper. *Id.* at 888 n.8. The victim impact evidence complained of by the Appellant is clearly of the nature envisioned by *Nesbit. See generally State v. Smith*, 993 S.W.2d 6, 17 (Tenn. 1999). The fact that the death of a loved one is devastating requires no proof. *Morris*, 24 S.W.3d at 813 (Appendix). Accordingly, we cannot conclude that the admission of the victim impact testimony was unduly prejudicial. This issue is without merit.

XII. Proportionality Review

For a reviewing court to affirm the imposition of a death sentence, the court must determine whether:

> (A) The sentence of death was imposed in any arbitrary fashion;
>
> (B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;
>
> (C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and
>
> (D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

Tenn. Code Ann. § 39-13-206(c)(1) (1997). The sentencing phase in this matter proceeded in accord with the procedure established by the applicable statutory provisions and Rules of Criminal Procedure. We conclude that the sentence of death, therefore, was not imposed in an arbitrary fashion. Moreover, the evidence indisputably supports aggravating circumstances (i)(2), the Appellant was previously convicted of one or more felonies which involved the use of violence to the person; (i)(6), the murder was committed for purpose of avoiding prosecution; and (i)(7), the

murder was committed during commission of a robbery or kidnapping. Tenn. Code Ann. § 39-13-204(i)(2), (6), (7).[7]

Additionally, this court is required by Tennessee Code Annotated § 39-13-206(c)(1)(D), and under the mandates of *State v. Bland*, 958 S.W.2d 651, 661-74 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536 (1998), to determine whether the Appellant's sentence of death is disproportionate to the penalty imposed in similar cases. *State v. Godsey*, 60 S.W.3d 759, 781 (Tenn. 2001). The comparative proportionality review is designed to identify aberrant, arbitrary, or capricious sentencing by determining whether the death penalty in a given case is "'disproportionate to the punishment imposed on others convicted of the same crime.'" *State v. Stout*, 46 S.W.3d 689, 706, *cert. denied*, 534 U.S. 998, 122 S. Ct. 471 (2001) (quoting *Bland*, 958 S.W.2d at 662). "If a case is 'plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed,' then the sentence is disproportionate." *Id.* (quoting *Bland*, 958 S.W.2d at 668).

In conducting our proportionality review, this court must compare the present case with cases involving similar defendants and similar crimes. *Id.* (citations omitted); *see also Terry v. State*, 46 S.W.3d 147, 163 (Tenn.), *cert. denied*, 534 U.S. 1023, 122 S. Ct. 553 (2001) (citations omitted). We consider only those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. *Godsey*, 60 S.W.3d at 783; *State v. Carruthers*, 35 S.W.3d 516, 570 (Tenn. 2000), *cert. denied*, 533 U.S. 953, 121 S. Ct. 2600 (2001). We begin with the presumption that the sentence of death is proportionate with the crime of first degree murder. *Terry*, 46 S.W.3d at 163 (citing *State v. Hall*, 958 S.W.2d 679, 699 (Tenn. 1997)). This presumption applies only if the "sentencing procedures focus discretion on the 'particularized nature of the crime and the particularized characteristics of the individual defendant.'" *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 308, 107 S. Ct. 1756 (1987)).

Applying this approach, the court, in comparing this case to other cases in which the defendants were convicted of the same or similar crimes, looks at the facts and circumstances of the crime, the characteristics of the Appellant, and the aggravating and mitigating factors involved. *Id.* at 163-64. Regarding the circumstances of the crime itself, numerous factors are considered including: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of provocation; (7) the absence or presence of premeditation; (8) the absence or presence of justification; and (9) the injury to and effect on non-decedent victims. *Stout*, 46 S.W.3d at 706 (citing *Bland*, 958 S.W.2d at 667); *see also Terry*, 46 S.W.3d at 164. Contemplated within the review are numerous factors regarding the Appellant, including: (1) prior criminal record; (2) age,

[7] We note that under either theory of guilt for the murders of Ewing and Lee, *i.e*, the Appellant's own conduct or the conduct of Davis, the record supports application of aggravating circumstances (i)(6) and (7). Based upon the Appellant's "'major participation in the felony committed, combined with reckless indifference to human life[,]'" (i)(6) and (7) may be vicariously applied, even if the Appellant was not the actor responsible for these circumstances. *Owens v. State*, 13 S.W.3d 742, 760 (Tenn. Crim. App. 1999), *perm. to appeal denied*, (Tenn. 2000) (citing *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 1688 (1987)).

race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. *Stout*, 46 S.W.3d at 706 (citing *Bland*, 958 S.W.2d at 667); *Terry*, 46 S.W.3d at 164.

In completing our review, we remain cognizant of the fact that "no two cases involve identical circumstances." *See generally Terry*, 46 S.W.3d at 164. There is no mathematical or scientific formula to be employed. Thus, our function is not to limit our comparison to those cases where a death sentence "is perfectly symmetrical, but only to identify and to invalidate the aberrant death sentence." *Id*. (quoting *Bland*, 958 S.W.2d at 665).

The circumstances surrounding the murder in light of the relevant and comparative factors are that the Appellant and Davis planned to rob the victims of guns and an automobile and then kill the victims because they would be able to identify them. After arranging a meeting with the victims, the Appellant and Davis restrained the victims and took them to a remote construction site in the Nashville area. Once at the construction site, the victims were robbed of several clothing items and shot in the head numerous times. The Appellant and Davis then burned the stolen vehicle and spent the night in a local motel. Upon encountering the police the following morning, the two men fled. The Appellant avoided capture for approximately a week. Upon being taken into custody, he gave a self-serving statement to police, attempting to blame responsibility for the murders upon other members of his gang. Furthermore, the Appellant was previously convicted of aggravated assault, tow aggravated robberies, and he was convicted of the murder of twelve-year-old Adrian Dickerson in a Megamarket parking lot in Nashville.

In mitigation, evidence was presented establishing that, as a young child, the Appellant was present in his home when his mother discovered the body of his step-father, who had committed suicide. Furthermore, the Appellant's mother suffered from paranoid schizophrenia and had been institutionalized due to her illness. After the suicide of the Appellant's step-father and the resulting nervous breakdown of his mother, the Appellant and his siblings went to live with his grandmother, who was granted full custody of the children. Additionally, the Appellant did not have frequent contact with his biological father, who spent the Appellant's early childhood in prison. The Appellant also has one child. Defense expert, Dr. William Burnett, testified that the Appellant had a very strong genetic history of mental disorders, a family history of people with criminal problems, and he grew up in a disturbed, chaotic, and disorganized family situation.

While no two capital cases and no two capital defendants are alike, we have reviewed the circumstances of the present case with similar first degree murder cases and conclude that the penalty imposed in the present case is not disproportionate to the penalty imposed in similar cases. *See, e.g.*, *State v. Gerald Powers*, No. W1999-02348-SC-DDT-DD (Tenn. at Jackson, Jan. 6, 2003) (for publication) (the defendant followed the victim over 50 miles to Memphis, where he abducted her from a driveway, took her to an abandoned house in a rural part of Mississippi, shot her in the head, robbed her of her money and jewelry, and left her body in a storage room, death sentence upheld based upon (i)(2), (i)(5), and (i)(6) aggravators); *Stout*, 46 S.W.3d 689 (finding (i)(2), (i)(6), and

(i)(7) aggravating circumstances and imposing death, where the defendant and three co-defendants abducted a woman from her driveway, forced her into the backseat of her car at gunpoint, drove her to an isolated location, and shot her once in the head); *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993), *cert. denied*, 510 U.S. 1215, 114 S. Ct. 1339 (1994) (twenty-seven-year-old defendant shot clerk in the head during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); *State v. Bates*, 804 S.W.2d 868 (Tenn. 1991), *cert. denied*, 502 U.S. 841, 112 S. Ct. 131 (1991) (the defendant, while on escape status, abducted a woman, took her into some woods, tied her to a tree, gagged her, and shot her once in the head, death sentence upheld based upon (i)(2), (i)(6), and (i)(7) aggravators); *State v. King*, 718 S.W.2d 241 (Tenn. 1986) (the defendant abducted a woman, confining her in the trunk of her own car, drove her to an isolated location, where he made her lie on the ground, and then shot her in the head, death sentence upheld based upon (i)(2), (i)(5), (i)(6), and (i)(7) aggravators); *State v. Harries*, 657 S.W.2d 414 (Tenn. 1983) (thirty-one-year-old male defendant shot and killed clerk during robbery of convenience store, death sentence upheld based upon (i)(2) aggravator); *State v. Coleman*, 619 S.W.2d 112 (Tenn. 1981) (twenty-two-year-old defendant shot and killed sixty-nine-year-old victim during course of robbery, death sentence upheld based upon (i)(2) and (i)(7) aggravators). Additionally, the sentence of death has consistently been found proportionate where only one aggravating factor is found. *See, e.g., State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000), *cert. denied*, 532 U.S. 925, 121 S. Ct. 1367 (2001) (prior violent felony); *State v. Sledge*, 15 S.W.3d 93 (Tenn.), *cert. denied*, 531 U.S. 889, 121 S. Ct. 211 (2000) (prior violent felony); *State v. Matson*, 666 S.W.2d 41 (Tenn.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 225 (1984) (felony murder).

Our review of these cases demonstrates that the sentences of death imposed upon the Appellant are proportionate to the penalty imposed in similar cases. In so concluding, we have considered the entire record and reached the conclusion that the sentences of death were not imposed arbitrarily, the evidence supports the finding of (i)(2), (i)(6), and (i)(7) aggravators beyond a reasonable doubt, the evidence supports the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt, and that the sentences are not excessive or disproportionate. Accordingly for these reasons, we affirm the Appellant's convictions and sentences of death.

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DAVID G. HAYES, JUDGE